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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

CROCKER NATIONAL BANK,
Appellant,

v.

PAUL PERDUE,
Appellee.

On Appeal from the Supreme Court of the State of California

BRIEF OF BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, *AMICUS CURIAE*, IN SUPPORT OF THE JURISDICTIONAL STATEMENT OF CROCKER NATIONAL BANK

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This brief is filed under Rule 36.1 of the Rules of this Court with the consent of all the parties.

INTEREST OF AMICUS CURIAE

Bank of America National Trust and Savings Association is a national trust and savings association created under the laws of United States of America, with its principal place of business in San Francisco, California. Bank of America is subject to the provisions of the National Bank Act (12 U.S.C. § 21 *et seq.*), the Federal Reserve Act (12 U.S.C. § 221-530), the Federal Deposit Insurance Corporation Act (12 U.S.C. § 1811-32) and the two recent banking deregulation acts, the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub.L. 96-221,

94 Stat. 132, and the Garn-St Germain Depository Institutions Act of 1982, Pub.L. 97-320, 96 Stat. 1469. Further, Bank of America is subject to the powers and regulations of the Comptroller of the Currency regarding deposit accounts. Bank of America offers deposit accounts to the general public.

For over fifty years, Bank of America's deposit account customers have contracted with the Bank to pay and have paid a service charge for handling checks presented to the Bank for payment against an account which has insufficient funds ("NSF" charges). The Bank's service charge has run from $.50 per item in the 1930's to the current $10.00 charge. The amount of the service charge is disclosed in writing to the customer when a checking account is opened and whenever the amount of the charge changes. California Financial Code § 865.4 (1977). *See* JS at 5.

Six lawsuits covering NSF charges are pending currently against Bank of America in the Superior Court of California for the City and County of San Francisco. They consist of one certified statewide class action, two abated and uncertified statewide class actions, two other stayed uncertified statewide class actions, and a recently filed sixth uncertified statewide class action. All of these overlapping cases, and numerous similar suits against many other California banks, await the outcome of the Crocker National Bank appeal. Each of these suits claims the Bank of America's price is excessive or unconscionable. Each seeks enormous damages in the nature of a refund of most of the service charge paid by the Bank's customers as far back as any statute of limitation will permit, declaratory relief compelling a reduced price in the future and punitive damages.

SUMMARY OF ARGUMENT

The California Supreme Court decision fundamentally threatens the safety and soundness of national banks doing business in the State of California, in that it provides for judges or juries to set prices for bank services retroactively, on an *ad hoc* basis, thereby subverting federal preemption.

ARGUMENT

The California Supreme Court decision amounts to judicial legislation establishing a judge or jury as the retroactive price setter for bank service charges. Under this decision national banks would face review by a judge or jury of the price of their NSF charges, and perhaps other service charges as well, long after the services have been performed and the charges have been paid by the customer.

That retroactive review would be permitted under the simple rubric that a bank's service charge may be "unconscionable" under § 1670.5 of the California Civil Code.[1] While the California Supreme Court suggests various factors to be considered in this review, such as, the "costs" to the bank to provide the service, "the basis and justification for the price," and the "true value" of the service (App. A. at 11a; JS at 6), the court's scheme would simply permit a judge or jury to decide that in its opinion any service charge was too high. This could happen notwithstanding the acceptability of the price by the Comptroller in his examination with respect to the safely and soundness of a bank's operation and compliance with applicable law.

Title 12 C.F.R. § 7.8000 (1984) requires that national bank service charges be set on a competitive basis, in accordance with sound business judgment and in a manner designed to achieve the statutory goal of a safe and sound national banking system. *See*, 12 U.S.C. § 1818(b). The National Bank Act confers compre-

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[1] California Civil Code § 1670.5 (1979) reads:

"(a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(b) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination."

hensive review and enforcement powers on the Comptroller of the Currency to assure the safety and soundness of the national banking system. *See*, citations generally set forth in Crocker National Bank's jurisdictional statement, page 14. In rejecting Crocker's preemption argument, the California Supreme Court rejects the federal regulatory scheme set forth in the National Banking Act and the powers of the Comptroller to regulate the safety and soundness of national banks.

The court's decision does not require adherence to the guidelines issued by the Comptroller of the Currency for pricing deposit account service charges. Those guidelines include, among others, consideration of deterrence of misuse by customers of a banking service, enhancement of a bank's competitive position, and maintenance of its safety and soundness. 12 C.F.R. § 7.8000(b). The court's olive branch footnote 42 (App. 34a-35a), which tries to remove any actual conflict between state and federal law by allowing a court to use the same factors set forth in the Comptroller's regulation in deciding whether a fee is unreasonable or unconscionable, skirts the real issue behind preemption. The Comptroller through examination is to determine the safety and soundness of national banks. The Comptroller has the duty and expertise to regulate uniformly and consistent with national policy. A judge or jury has no such experience or responsibility and can hardly be expected to acquire such during the course of a trial.

The depth of the conflict between this judicially created rate setting procedure and the national system of banking regulation is fully highlighted by the court allowing for the invalidation of a price which is equal to or less than the prevailing market price (JS at 6). Although the court admits that it is unlikely a court would find a price set by a freely competitive market to be unconscionable, that is not precluded by the factors suggested for reviewing price. Also the court decides that a price set in an oligopoly setting should not be immune from scrutiny, App. A. at 11(a), notwithstanding the lack of any pleading by plaintiff of a conspiracy to set price or monopolize (JS at 6-7). This flies squarely against the Comptroller's ruling here that national bank

service charges be set on a competitive basis. Title 12 C.F.R. § 7.8000.

Even were the court decision limited to prospective price setting, it would still conflict with national policy regarding the pricing of banks' services (JS at 17-22). The decision of the court leaves the price setting to a judge or jury, and not a legislatively created body, such as a public utility commission or in this matter, the Comptroller of the Currency.

A judge or jury has no substantive rules or experience for setting price, whether the Comptroller is charged with the responsibility and obligation of overseeing banks, in a manner that requires uniform application to the entities it governs. *See, e.g.* pertinent statutes, regulatory obligations, interpretive rulings and the Comptroller's *Handbook for National Bank Examiners* set forth in JS Appendix.

The Comptroller must not consider prices in a vacuum but in accordance with sound business judgment and in a manner designed to achieve the statutory goal of a safe and sound national banking system. 12 U.S.C. § 1818(b). Similarly, a public utility commission charged with regulating the prices of utilities is also charged with granting a rate of return it determines to be reasonable to support the utility's existence, level of public service and adequate ability to raise capital. *See generally, Cantor v. Detroit Edison Co.*, 428 U.S. 579, 595-96 (1976). The Comptroller of the Currency has spoken uniformly to national banks on the manner in which they should set price to effectuate their safety and soundness. Title 12 C.F.R. § 7.8000 (1984). A state regulatory scheme as this one created by the California Supreme Court simply dissolves all certainty and threatens our system of national banks. In our governmental structure, rate making is properly left to a legislative body or a legislatively created agency designed to oversee the complex process. *See, e.g. Jacobs v. Citibank N.A.*, 61 N.Y. 2d 689, 462 N.E. 2d 1182, 1183, 474 N.Y.S. 2d 464 (Ct. App. 1984); *Cf. Franklin National Bank v. New York*, 347 U.S. 373 (1954); *Fidelity Federal Savings & Loan Ass'n. v. De La Cuesta*, 458 U.S. 141 (1982).

National banks now face federally mandated deregulation of interest rate ceilings, and find themselves in competition for deposits not only with other banks but with brokerage houses (Merrill Lynch) and department stores (Sears Roebuck & Co.). *See*, Reply Brief of Amicus Curiae Comptroller of the Currency with respect to the Comptroller's interpretive ruling (JS App. 104a-118a). National banks must be free to set their prices on a competitive basis in the market place, consistent with sound business judgment and without the interference of *ad hoc* judge or jury retroactive price setting decisions. Their safety and soundness are threatened by the state price setting scheme established here which is contrary to national policy.

CONCLUSION

For the reasons stated, this court should exercise its plenary jurisdiction to review and reverse the judgment of the California Supreme Court.

Respectfully submitted,

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